No. 85 - 6004

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BRET CLARK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

BRIEF OPPOSING MOTION TO DISMISS

APPEAL FROM AN ORDER OF THE FIFTH DISTRICT
COURT OF APPEAL, STATE OF FLORIDA

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TABLE OF CONTENTS

TABLE OF CITATIONS

On or about December 9, 1985, appellee received the jurisdictional statement filed herein by appellant. On February 28, 1986, the Court wrote to appellee asking that it file a response in accordance with Rule 16 prior to March 31. Rule 16.1 requires that this response be filed within thirty days of receipt of the jurisdictional statement. Appellee then filed a Motion to Dismiss, serving this document on March 25, 1986, on the grounds that appellant did not adequately or properly raise the constitutional issue, concluding that it was therefore not passed upon by the lower court, and that no federal question is raised because, according to appellee, the lower court based the order under review on a rule of court and not the statute under attack.

In support of its motion, the State of Florida relies upon distortions, if not misrepresentations of the record below, as well as a continuation of the ad hominem denunciation of the appellant that resulted in the order here on review. Appellee concludes by stating that appellant is habitually tardy with filings in the state court and has not complied with state procedural rules, without making a cogent argument as to how, if true, these statements relate to the specific grounds for dismissing this appeal relied upon by appellee. Indeed, appellee's motion is itself 2 1/2 months late, and demonstrates an abject lack of comprehension of the Florida Rules of Appellate Procedure. Accordingly, the motion should be denied, and the cause allowed to proceed:

I. THE TRUE POSTURE OF THE CASE

Appellee begins its motion by describing a lax litigant who failed to present pleadings in a timely fashion. The truth of the matter is, appellant is the victim of a state court system which, confronted by a critical and recalcitrant defendant, decided to punish him for attempting to assert his right to a day in court on an appeal from a conviction in a presumably routine traffic case.

The case originally began in August of 1982 when appellant was cited for a traffic violation. Appellee's appendix at A - 3. Two years after his conviction, the appellate division of the local court that originally heard the case sent a one word order of affirmance to appellant's old address. Id. When the order was returned undelivered, the lower appellate court clerk sent

a notice that appellant's license would soon be suspended if he did not remit payment for his affirmed fine to the address from which the earlier order had been returned, knowing that appellant would not receive it. Appellee's appendix at A - 2. This was done in violation of Florida law, and, appellant would argue, without due process of law.

Because appellant did not receive notice of these events, his license was suspended, and he was deprived of his right to appellate review of the affirmance of his conviction. Contrary to the assertions of appellee, appellant is not stupid. He was well aware that his petition to review the affirmance had to be filed within thirty days of the order to be reviewed. In fact, appellant devoted a substantial amount of the petition to this issue, arguing that the 5th District Court of Appeal could take jurisdiction under the theory that appellate review could be had in such a case where an injustice would be averted. Appellee's appendix at A - 2 to A - 3. That court, as conceded by appellee, issued its Order to Show Cause why the Petition should not be granted. Under Florida Rule of Appellate Procedure 9.100(f), this order could not be entered unless the petition, which appellee now apparently argues was frivolous, demonstrated a preliminary basis for relief.

After the State filed its response, the court below dismissed the cause for lack of jurisdiction, and appellant filed for rehearing, complaining that the lower court violated its own rules by ruling prematurely. Appellee's appendix at A - 13 and A - 14. Rather than ruling on this motion, the 5th District Court of Appeal struck the motion as untimely because appellant was not entitled to extra days normally granted when documents are served by mail. When appellant complained to the Clerk of the court, he was invited to file a motion, which he did, asking the court to set aside its order on its own motion. Appellee's appendix at A - 15.

On July 9, 1985, the State responded to this motion, combining with its response a motion for fees under Florida Statute Section 57.105. Appellee's appendix at A - 16 and A - 17. Appellant's reply thereto dealt, for the most part, with the request for reconsideration of the court's order. Appellee's appendix at A - 19 through A - 21. On July 12, 1985, the 5th District Court of Appeal issued an order denying appellant's motion, apparently prior to receiving his response, and ordering appellant to show cause why the motion

for fees filed by appellee should not be granted. Appellee's appendix at A - 18. This order was sent to appellant return receipt requested.

As set forth more fully in appellant's response thereto, such a fee motion must meet a heavy burden to prevail, lest litigants be chilled from exercising their right to access to the courts. Appellee's appendix at A - 22 through A - 24. Because of this, the bulk of appellant's response was devoted to showing that the statute was not applicable, as opposed to arguing it is unconstitutional. Appellant then concluded by stating that he should not be punished for seeking his day in court, with the full expectation that the court below had absolutely no basis to award fees to appellee under Section 57.105. Id. at A - 24.

On July 25, 1985, the court below issued the order granting appellee $100.00 in fees. Id. at A - 25. Although the State would have the Court believe that this award was compensatory, the amount indicates otherwise. Indeed, appellant suggests that the amount was assessed in relation to appellant's argument on the merits, never reached by the court, that his original fine of $50.00 was improperly doubled by the trial court. The court below, in effect, doubled appellant's fine again. Thus, it was not until this order was entered that appellant could anticipate that the lower court would assess a punitive attorney's fees, which appellee even now argues was compensatory, not punitive, in retaliation for his criticism of the court's handling of his case.

Appellant then filed a proper motion to review this order, specifically charging the lower court with retaliation in violation of the United States Constitution. Id. at A - 26 and A - 27. Contrary to the representation of the State, the motion in its entirety is devoted to this issue, and it was not added as an "afterthought." In addition, the lower court denied this motion on the merits, not, as suggested by appellee, because it was procedurally improper. Id. at A - 28.

II. COUNTERARGUMENT

Appellee's arguments in support of its motion are flawed because of its errors in interpreting the rules of this Court as well as those of the lower court. A review of the record must lead the Court to conclude that the within appeal has been properly brought before the Court and that it involves an issue

that not only presents a substantial federal question, but one which is of critical importance to the proper functioning of the courts of this country.

As the above recital of the proceedings below should indicate, this issue narrowly focuses on the manner by which appellant was mistreated by the appellate court, not the substance of that appeal, as the 5th District Court of Appeal dismissed the cause for want of jurisdiction, which itself indicates the impropriety of the order issued, since the court had no authority to enter such an order. Nonetheless, this Court may be of the opinion that the result of this order calls into play the maxim de minimis non curat.

Appellant has been made to suffer, however, in ways that may not readily appear from the record. If left to stand, the order entered by the lower court will serve to demean appellant personally and professionally, particularly in light of the scurrilous allegations upon which it was based, now a matter of public record. In addition, appellant has been unable to obtain a driver's license during the pendency of the appeal below, forcing him to rely on public transportation, and is subject to arrest if placed in the position of having to drive with a suspended license.

Thus, despite the State's apparent predilection to belittle these matters, the effect of the order here appealed is substantial, as is the legal issue presented. But before the question of the substantiality of the federal question presented, and whether it was properly raised, are treated, certain questions not raised by appellee should be explored:

(A) Preliminary Considerations

In requesting the appellee to respond to the jurisdictional statement, this Court may have had reservations as to the potential that appellant could have sought review in the Florida Supreme Court. This issue was not raised by the State. This Court held in Nash v. Florida Industrial Commission, 389 U.S. 235, 88 S. Ct. 362, 19 L Ed 2d 438 (1967) that where, as here, a decision of an intermediate appellate court is not reviewable by a higher court, an appeal would lie. Appellant even went so far as to obtain a letter from the Supreme Court of Florida stating that the order here on review could not be heard by that court. Appellant's appendix at A - 18.

This point is of special significance here, because the State is obstensibly arguing to the Court that the lower court never passed upon the issue whether Florida Statute Section 57.105 is unconstitutional. A District Court of Appeal in Florida may insulate its rulings from further appellate review (except in this Court) by simply neglecting to "expressly" articulate the basis for its decision. see, Fla.R.App.P. 9.030(a)(2)(A)(i) - (iv). Because the sole issue raised by appellant in his motion to review the fee award was the issue here presented, the lower court order on appeal was determinative of this issue, and was passed upon by the 5th District Court of Appeal.

(B) The Federal Question is Properly before the Court

The State urges dismissal of this appeal on the grounds that the statute here at issue is "wholly inapplicable" to the case because the court relied on a rule of procedure to assess fees, and because, in its view, the proper method of contesting an award of fees is not via the provisions of Fla.R.App.P. 9.400, but by way of a motion for rehearing. Aside from the fact that this strained interpretation of the appellate rules is contrary to their plain meaning, it necessarily entails a radical departure from the long-standing law in Florida with respect to attorney's fees.

Appellee devotes substantial space in its motion describing situations where an appellate court grants the right to fees, remanding to the lower court to assess the amount. No effort is made to fit these facts to the case at bar. Appellant readily concedes that this is the preferred method of assessing fees on the appellate level. see, Thornton v. Thornton, 433 So.2d 682, rev. den. 443 So.2d 980 (5th DCA 1983). That the lower court declined to follow the usual method in the case of appellant, together with the fact that the appellate court assessed an amount for fees without reference to any supporting documentation as to the time spent by the appellee's counsel, is further evidence that assessment of fees was purely punitive, not compensatory.

Rule 9.400 governs the procedure by which the appellate courts of Florida grant fees, sub-part (c) of which mandates that a party seek review of orders entered pursuant to the rule by way of motion. This is the practice

in the State of Florida, and appellant followed this procedure properly. Appellee's wooden misaplication of the rules stems from its seizing upon the lower court's mere reference to the rule in its order. The rule itself did not, and could not, form the legal foundation of the award of fees.

In the committee notes to the rule, the draftsmen make clear that a motion for fees must be accompanied by a legal basis therefore, and the rule is "not intended to give a right to assessment of attorney's fees unless otherwise permitted by substantive law." This reflects the well established "American Rule" that each party must bear the cost of their attorney's fees, unless otherwise provided by statute, contract, or where a fund is created. Estate of Hampton v. Fairchild-Florida Construction Company, 341 So.2d 759, 761 (Fla. 1976) citing Kittel v. Kittel, 210 So.2d 1, 3 (Fla. 1976). Thus, the State's interpretation of the order on review would ascribe to it a far-reaching meaning that clearly was not intended. The only plausible interpretation is what happened: the State filed a motion for fees under Section 57.105 and the court granted it.

In addition, appellant raised the unconstitutionality of this statute at the appropriate time, and vigorously contested its applicability from the moment it was raised. The limiting construction imposed on the statute by the courts of Florida clearly remove appellant's case from its reach. It would be unreasonable to hold appellant to the prescience necessary to anticipate that the appellate court would apply the statute beyond its limits. Therefore, it was not until the court had done so that a challenge to the statute, as applied, could be raised. At that time, the sole ground presented on review of the fee assessment was the invalidity of the statute, and this question was ruled upon necessarily by the court.

Because the lower court so ruled, the State is not entitled to dismissal of this appeal. In order to prevail, the State must show first that the federal question was not timely and properly raised, and, in addition, that it was not decided by the lower court. see, Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979). This question has, undoubtably, been properly brought before this Court, and, accordingly, the State's motion must be denied.

(C) The Question is Substantial

Finally, the State argues that no substantial federal question is presented herein, although it makes no argument in support of this conclusory statement. Presumably, the State relies on the argument that because, in its opinion, the issue was not raised properly below, it does not exist. Such an interpretation would render redundant the requirement in this Court's rule that a substantial federal question be presented, apart from that which mandates that it be properly raised.

To dismiss this appeal on this ground, the appellee must show either that the issue has already been decided, or so untenable as to be termed "frivolous". Appellant has found no case stating that a court may retaliate against a critical litigant by assessing fees in the face of a constitutional assault upon such a practice. To argue that such an issue lacks substance is to engage in a level of haughty arrogance employed by the court below in the issuance of its order.

This Court can certainly take judicial notice of the fact that the courts of this country, both state and federal, are overburdened with litigation. The temptation may exist in such courts to "teach a lesson" to an unsuccessful litigant, particularly when the litigant is so critical of the court that the opposing party directs the court's attention to correspondence complaining to the court in its request for fees. But concern for overcrowded courts and attempts to curtail abuses must be circumspect, or the right to access to them will be chilled, if not destroyed. The statute here at issue can, and has been used in the case at bar to deny access to the courts, and to punish a litigant who dared to call into question the propriety of a court's operation. This, in turn, will allow courts to avoid self-improvment, which will then lead to still more inefficiency and malfunctioning in the courts.

The statute called into question has no element of bad faith on the part of the offending litigant. It can, as shown by the facts herein, be applied by a court in retaliation for critical statements by the litigant. It's constitutionality is unquestionably a substantial question. Appellee's motion should therefore be denied.

III. CONCLUSION

The Court ordered that the appellee file a response to the within appeal after the time for this response was past due. Appellant has attempted to anticipate any reservations the Court may have as to the propriety of this appeal, in addition to refuting the mistatements of the record and the arguments presented by the State in support of its motion.

Appellee has understandably sought to characterize the action of the lower court in assessing fees as compensatory, not punitive. But the facts belie this conclusion. The court assessed these fees after holding that it lacked jurisdiction in the case: it assessed these fees without any documentation to support the amount: it re-doubled appellant's fine assessed below, after appellant claimed this was unconstitutional: it granted fees upon a motion relying solely on a personal attack on the appellant and a reference to critical correspondence in the court file: and the amount does not reflect an appropriate sum to compensate an attorney for his or her services; and was assessed directly, contrary to the preferred practice, as enuciated by the very same court.

Appellant has been punished for criticising the lower court, and the statute used for this purpose was misapplied. The fact of its susceptibility to misapplication, and the resulting chilling effect on appellant's rights renders it unconstitutional. This presents a substantial and important federal question, one which was properly and timely raised below, and in any event was passed upon by the lower court. Accordingly, this appeal is properly before the Court, and appellee's motion to dismiss must be denied, or, at the very least, consideration of the Court's jurisdiction postponed until a full briefing on the merits.

Respectfully submitted,

BRET SHAWN CLARK, ESQUIRE